

## **Virginia Department of Social Services** **Response to Barrier Crime Workgroup Questions**

### **1. What should and should not be a barrier crime?**

This is a policy decision for the joint subcommittee and GA to make. At a minimum, VDSS must comply with the federal laws governing barrier crimes in our program areas (for child welfare, those can be found at [42 U.S.C. 671\(a\)\(20\)](#) and for child care programs at [42 U.S.C. 9858f](#)). Based on staff research, Virginia's statute for barrier crimes is much more restrictive than federal law in the areas of approving prospective foster and adoptive parents and employment in a child care program.

At the first meeting, several members of the joint subcommittee voiced support for focusing on barrier crimes for prospective foster parents. We suggest that the joint subcommittee may wish to focus even more specifically on barrier crimes for relatives and fictive kin who are seeking to be approved as foster parents, particularly since the state and federal direction and best practice is to keep children at risk of being removed from their homes with a relative or fictive kin. In addition, there are racial disparities that exist in Virginia's foster care system. Black/African American children in foster care are more likely to age out of the foster care system without a permanent caregiver. Because data tells us Black/African American Virginians are disproportionately represented in those convicted and incarcerated, Virginia's barrier crime statute is considered to be an impediment for placing Black/African American children with relatives and fictive kin that could provide a permanent and stable home.

### **2. Whether there should be a time limit following a conviction when a crime is no longer a barrier crime and what such time limit would be?**

Federal law already incorporates time limits for certain crimes. Under federal law, if a prospective foster or adoptive parent has a felony conviction for physical assault or battery (so long as the victim of such crime was an adult and it was not domestic-related), or a drug-related offense, the conviction would not be considered a barrier crime so long as the felony was not committed within the past 5 years. However, Virginia's laws are much more restrictive, requiring the period of lapsed time to be ten or twenty years in some cases. In addition, many of the time limits must also be accompanied by other conditions, such as having one's civil rights restored by the Governor.

### **3. Whether there should be an exception, waiver, or appeals process and what that might look like?**

The Code of Virginia currently has provisions for some exceptions and waivers to barrier crime convictions as defined in § 19.2-392.02. These exceptions and waivers vary between programs with specific circumstances and do not apply across the board to all program types. The federal law also allows for exceptions and waivers in certain circumstances and programs.

#### *Exceptions*

In Virginia, there are several exceptions to barrier crime requirements. Section § 63.2-1721 E-H of the Code of Virginia allows for exceptions for a child-placing agency to approve a foster or

adoptive parent for certain convictions, when a specific time period has elapsed and the person has met certain circumstances.

For child care programs, the Code of Virginia § 63.2-1720.1 G. allows a child day center to hire a person who has been convicted of not more than one misdemeanor offense under § [18.2-57](#), or any substantially similar offense under the laws of another jurisdiction, if 10 years have elapsed following the conviction, unless the person committed such offense while employed in a child day center or the object of the offense was a minor. Assisted living facilities and adult day care centers can hire individuals with one misdemeanor barrier crime conviction not involving abuse or neglect, or any substantially similar offense under the laws of another jurisdiction, if five years have elapsed following the conviction (§ 63.2-1720.1 G).

In Kentucky, a rehabilitative program will allow certain individuals to be employed with a disqualifying offense after a certain period of time and/or home study has been completed. Consideration is also given to those with expunged records or dismissed cases.

### *Waivers*

Under federal law, individuals with felony drug-related offenses are eligible for a waiver review for those seeking to work in a child care program, but Virginia does not provide this option. Section 63.2-1723 of the Code of Virginia gives the the DSS Commissioner authority to grant a waiver to an adult household member of a family day home with only one misdemeanor conviction of assault and battery or assault battery of a family or household member, as long as certain criteria are met and the household member is not employed at the family day home. The waiver request must include information related to each conviction: documentation on circumstances of the crime, description of what the individual has completed to improve character and reputation such as treatment or diversion programs, and four letters of reference.

Federal law allows for waivers to be granted for relatives and fictive kin seeking to become foster parents. However, federal law does not permit waivers for all other types of foster homes.

Under Virginia Code, no waivers are available for those seeking employment in assisted living facilities, adult day care centers, child care programs (except family day homes), and children's residential facilities. If the General Assembly were to change the statute, VDSS could institute a waiver process for certain barrier crimes, as long as the statute complies with the federal law.

One option the Joint Subcommittee may wish to consider is to expand the waiver process to allow the DSS Commissioner authority to grant a waiver to all DSS programs when an individual has one misdemeanor barrier crime conviction provided that five years have elapsed following the conviction, the conviction does not involve children, the conviction does not involve vulnerable adults, and the conviction does not include sexual offenses. The waiver could be transferable to another agency within 12 months of the waiver determination date. After 12 months, the individual would need to request a new waiver when moving to another agency. [West Virginia](#) has a similar waiver process.

## **4. Demographic data on individuals for whom a background check is completed and for whom a criminal conviction is a barrier to employment, licensure, etc.**

The agency does not have demographic data.

## **5. Recidivism rates of barrier crimes.**

The agency does not have data on recidivism.

#### **6. Information on what has been done in other states regarding barrier crimes and criminal history records checks.**

This [website](#) has information on barrier crimes and background check requirements for prospective foster, adoptive, and kinship caregivers in each state. The data is current through September 2018.

VDSS staff researched ten other states to compare Virginia barrier crimes statute regarding employment in child care programs. By far, Virginia's list is far more extensive than other state's barrier crimes list. Most states have more exceptions, waivers, or review processes that allow individuals with prohibited convictions to be considered for employment or approval. See spreadsheet 'Barrier Crimes National Research' for more details.

#### **7. If there should be tiered levels of barrier crimes and what that might look like in the Code?**

If the General Assembly were to change the statute, VDSS could implement time limits for certain barrier crimes or certain tiered levels. For foster and adoptive parents, the tiered levels could be split into the following categories: violent felonies, crimes involving a minor, domestic-related crimes, drug-related crimes, and misdemeanors.